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In The

Supreme Court of the United States

October Term, 1978

No. 78-1039

JOSEPH FARINO,

Petitioner,

vs.

ALBA FARINO,

Respondent.

Petition for a Writ of Certiorari to the Appellate Division of the Supreme Court of the State of New York, Second Judicial Department

BRIEF IN OPPOSITION FOR RESPONDENT

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BRIEF IN OPPOSITION FOR RESPONDENT

COUNTER-STATEMENT OF FACTS

Petitioner at trial term did not seek an award to himself of either counsel fees or support. Nor, in moving the trial court for a downward modification of support ordered to be paid by him to the respondent, did the petitioner apply for counsel fees or to have the respondent directed to pay for his support.

The arguments of the petitioner addressed to the Appellate Division of the Supreme Court of the State of New York were confined to his contention that the awards of counsel fees and alimony to be paid by him were excessive. Only upon affirmance by that appellate tribunal did the petitioner, for the first time, attempt to raise the question of the constitutionality of the statute Domestic Relations Law §§236 and 237 by motion to reargue and for leave to appeal to the court of appeals. In opposition to that motion it was argued by respondent, *inter alia*, that the petitioner's said motion was untimely brought, 22 N.Y.C.R.R. §670.5, and additionally that upon a motion for permission to appeal to the court of appeals it is improper to urge as a basis therefor points of law not addressed at trial term or upon appeal. Both said motion and a subsequent motion addressed to the court of appeals for permission to appeal were denied without opinion. Petitioner then brought motion to reargue the court of appeals denial of leave to appeal, which said motion was likewise denied without opinion.

COUNTER-QUESTIONS PRESENTED

1. Whether the petitioner has demonstrated that the order of the New York Court of Appeals denying leave to appeal was grounded upon the constitutionality of the statutes sought to be reviewed?

2. Whether the petitioner has requisite standing to challenge the constitutionality of the statutes.

ARGUMENT

I.

Petitioner, by failing to timely raise the question of constitutionality in the state court has waived the issue.

As was observed by this Court in *Hulbert v. City of Chicago*, 202 U.S. 275, 26 S. Ct. 617, 50 L. Ed. 1026 at page 276:

> "In order to give this court the power to re-examine the judgment of the state court, the title, right, or privilege and immunity must be specifically set up or claimed at the proper time and in the proper way, and the right on which the party relies must have been called to the attention of the court in some proper way, and the decision must have been against the right claimed (cases cited)."

Furthermore, the Court continued at page 277:

> "This court will recognize and be governed by the rule of practice in a state court prescribing the requirements to be observed in order to save a question for review in that court, Erie Railroad Co. v. Purdy, 185 U.S. 148."

See also Shelley v. Kraemer, 334 U.S. 1, 68 S. Ct. 836, 92 L. Ed. 1161; *Walters v. St. Louis*, 347 U.S. 231, 74 S. Ct. 505, 98 L. Ed. 660.

The practice in the court of appeals is governed both by statute and rule C.P.L.R. §5601(b)(1) and (2) and 22 N.Y.C.R.R. §500.9(b). Said rule states that a motion for reargument may not be based on the assertion for the first time of new points except for extraordinary and compelling reasons.

The said statute provides that, had a substantial constitutional question with appropriate standing in the petitioner been presented, and the issue of constitutionality been timely raised, an appeal to the court of appeals would have been of right.

Historically, the cases emanating from the court of appeals are in accord that an appeal involving the constitutionality of a statute, though not urged at trial term, will be accepted for review provided "a substantial constitutional question was properly presented to the Appellate Division and was necessarily involved in its decision." *Jongebloed v. Erie Railroad Company*, 296 N.Y. 912. Furthermore, to be properly raised at the Appellate Division, the argument of unconstitutionality must have been urged in the petitioner's brief, *Matter of Hood & Sons, Inc. v. Du Mond*, 297 N.Y. 209, 213. In the case at bar, it is conceded that the constitutional argument was raised for the first time in a motion to re-argue. *See also Matter of United States of Mexico v. Schmuck*, 293 N.Y. 768; *Reilly v. Stenhart*, 218 N.Y. 660; and *Rogers v. Laytin*, 81 N.Y. 642.

It is the firm rule of both this Court and the New York Court of Appeals that by reason of the omission to have timely raised the question of constitutionality, that issue has not been preserved.

The policy of this tribunal is in accord that a question of constitutionality must be raised, in express terms, at the earliest possible opportunity. *Honeyman v. Hanan*, 300 U.S. 14, 57 S. Ct. 350, 81 L. Ed. 476, and that a constitutional argument raised for the first time on re-argument is untimely. *Radio Stat. WOW v. Johnson*, 326 U.S. 120, 65 S. Ct. 1475, 89 L. Ed. 2092, *mandate conformed to*, 19 N.W. 2nd 853, 146 Neb. 429, *mot. denied*, 66 S. Ct. 11.

The petitioner has quoted out of context the treatise Cohen and Krager, *Powers of the New York Court of Appeals*, §169 p. 642 in his petition for a writ of certiorari at page 5. Said treatise on point states:

> "Indeed, there is some authority in the Court of Appeals that, if only a general exception is taken to a judgment which can be assailed on constitutional grounds, it is sufficient to raise the constitutional question on appeal. This cannot be accurate, however. Clearly, this view would, to a great extent, nullify the main doctrine governing the raising of constitutional questions. Unquestionably something more than a merely general exception is required (citing *Purdy v. Erie Railroad Company*, 162 N.Y. 42)."

Moreover, the cases of *Massachusetts Nat. Bank v. Shinn*, 163 N.Y. 360 and *Howard v. The City of New York*, 234 N.Y. 505 as relied upon by the petitioner are inapplicable as, in both, the court of appeals, *sua sponte*, passed upon the constitutionality of the statute before it because of public policy considerations. This Court will assume want of proper presentation and the burden of showing otherwise is on the petitioner. *Street v. New York*, 394 U.S. 576, 89 S. Ct. 1354, 22 L. Ed. 2d 572. It is respectfully submitted that the petition wholly fails in this respect.

II.

Petitioner lacks requisite standing to challenge the constitutionality of the state statutes.

The petitioner, by not having sought an award of alimony or counsel fee for himself, is not aggrieved by the refusal of the court of appeals to have considered the belated constitutional question. He does not urge that the statutes for which he seeks review, have denied him substantive due process or equal protection. To have standing to attack the constitutionality of a statute, a party must show that he has substained some direct injury as a result of the enforcement thereof. *Cramp v. Bd. of Pub. Instruction of Orange County, Florida*, 368 U.S. 278, 82 S.

Ct. 275, 7 L. Ed. 2d 785. A petitioner must show that he possesses a direct and substantial interest in the outcome of judicial review. *Hanson v. Denkla,* 357 U.S. 235, 78 S. Ct. 1228, 2 L. Ed. 2d 1283, *reh. denied,* 358 U.S. 858, 79 S. Ct. 10, 3 L. Ed. 2d 92. It is not sufficient to show a denial of constitutional right. The petitioner must demonstrate that such a denial results in an injury to him. *Voeller v. Neilston Warehouse Co.,* 311 U.S. 531, 61 S. Ct. 376, 85 L. Ed. 322.

III.

The petition is untimely brought.

The Rules of the Supreme Court §41 "Briefs On the Merits-Time for Filing" require filing of petition for a writ of certiorari within forty five days (45) of the order noting or postponing probable jurisdiction. It is respectfully submitted that the controlling order was the order of the court of appeals dated September 26, 1978 denying leave to appeal to the court of appeals (Exhibit F to Petitioner's Brief) and not the subsequent order of that tribunal denying reargument (Exhibit G to Petitioner's Brief). As such, the docketing of the petition with this Court on December 27, 1978, is untimely, and proper grounds for dismissal.

As noted hereinabove, in the counter-statement of facts, the petitioner's motion to reargue addressed to the New York Court of Appeals was untimely brought, and this error was urged by the respondent in opposing said motion. The court of appeals subsequently denied the motion to reargue without opinion.

This Court has held that a defeated party who applies for a rehearing, and does not appeal from the final order within the time limited so to do assumes the risk of losing his right to appeal, if the lower court in denying a reargument does not extend the time for appeal. *Wayne United Gas Co. v. Owens-Illinois Glass Co.,* 300 U.S. 131, 57 S. Ct. 382. Moreover, in a

case, as is the one at bar, in which the motion for reargument is untimely brought, and denied without consideration of the merits, the time in which to petition for a writ of certiorari commences from the date of the underlying order and not from the date of the order denying reargument. *Bernards v. Johnson,* 314 U.S. 19, 62 S. Ct. 30, 86 L. Ed. 11; *Pfister v. Northern Illinois Finance Corp.,* 317 U.S. 144, 63 S. Ct. 133, 87 L. Ed. 146.

IV.

The United States Supreme Court will not grant a petition for certiorari in a case in which the order sought to be revised may have been determined upon an adequate state ground.

The order of the New York Court of Appeals denying leave to appeal without opinion may have been grounded upon the untimeliness of the motion and or upon the failure to have properly raised the question of constitutionality. This tribunal will deny a petition for certiorari in any case in which the order sought to be appealed may have been based on non-federal or non-constitutional grounds. *Local 333B, United Marine Division v. Battle,* 101 F. Supp. 650, *aff'd,* 342 U.S. 880, 72 S. Ct. 178, 96 L. Ed. 661; and *McGoldrick v. Compagnie Generale Transatlantique,* 309 U.S. 430, 60 S. Ct. 670.

Stated most strongly, this Court will not ordinarily grant certiorari of an order of a state court where the basis thereof makes consideration of an asserted federal question unnecessary. *Williams v. Kaiser,* 323 U.S. 471, 477, 65 S. Ct. 363, 367, 89 L. Ed. 398; and *Application of Baer,* 169 F.2d 770.

V.

The statutes of which review is sought are not repugnant to the Constitution in their application.

In the first instance it is respectfully pointed out that not every statute which separates persons into various classifications violates the Equal Protection Clause of the Constitution. As observed by the dissenting opinion of the Alabama Supreme Court in *Orr v. Orr,* 351 S.O. 2d 906, 907:

> "It is only invidious discrimination which offends the Constitution. Fergeson v. Skrupa, 372 U.S. 726, 83 S. Ct. 1028, 10 L. Ed. 2d 93; and Williamson v. Lee Optical Co., 348 U.S. 483, 75 S. Ct. 461, 99 L. Ed. 563."

Thusly, in *Kahn v. Shevin,* 416 U.S. 351, 94 S. Ct. 1734, 40 L. Ed. 2d 189 this tribunal upheld as constitutional a Florida statute granting widows an annual property tax exemption but affording no such benefits to widowers.

Furthermore, to be ruled unconstitutional a statute must be shown to be such in its application. Thusly, this Court has held in *Charleston Federal S. & L. Ass'n. v. Alderson,* 324 U.S. 182, 185, 65 S. Ct. 624, 627:

> "It is essential to our jurisdiction on appeal . . . that there be an explicit and timely insistence in the state courts that a state statute, *as applied,* is repugnant to the Federal Constitution, treaties or laws (cases cited)." (Emphasis furnished.)

Thusly, and as argued above, it was incumbent upon the petitioner to demonstrate that the statutes, in their application, have resulted in injury to him.

Moreover, several lower courts in New York have, in a proper case, awarded alimony to a husband. *Thaler v. Thaler,* 89 Misc. 2d 315, 391 N.Y.S. 2d 331, *rev'd on other grounds,* 58 A.D. 2d 890, 396 N.Y.S. 2d 815, and a wife has been ordered to pay child support to her husband who has been awarded their custody. *Bender v. Bender* n.o.r. 405 N.Y.S. 2d 188.

Each of the statutes sought to be reviewed affords due process and equal protection by expressly requiring the court to have regard for both the circumstances of the case and the respective parties. *See also Kover v. Kover,* 29 N.Y. 2d 408, 328 N.Y.S. 2d 641, 278 N.E. 2d 886 and *Kay v. Kay,* 37 N.Y. 2d 632, 376 N.Y.S. 2d 443, 329 N.E. 2d 143.

As was observed in the New York Supreme Court case, *Cary v. Cary,* 94 Misc. 2d 257, 404 N.Y.S. 2d 534, 536:

> "Courts have been willing to interpret provisions which appear to be restrictive so as to permit an award to male litigants Thaler v. Thaler, 89 Misc. 2d 315, 391 N.Y.S. 2d 331, revd. on other grounds 58 A.D. 2d 890, 396 N.Y.S. 2d 815, and to uphold the constitutionality of statutes which may be so interpreted. Carter v. Carter, 58 A.D. 2d 438, 397 N.Y.S. 2d 88."

Specifically, in *Carter v. Carter,* 58 A.D. 2d 438, 397 N.Y.S. 2d 88, the Appellate Division, Second Department — the Appellate Division involved in the case at bar — upheld the constitutionality of parallel statutes FCA §§413 and 414, while deeming excised therefrom the descriptive words "father" and "mother", and in its place interpreting the statutes as inferring a co-equal responsibility of parents to provide support for children in accordance with their respective means. In so doing, that court relied on the authority of the United States Supreme Court as expressed in the decisions of *Crowell v. Benson,* 288 U.S. 22, 52 S. Ct. 285, 76 L. Ed. 598; *Panama R.R. Co. v.*

Johnson, 264 U.S. 375, 390, 44 S. Ct. 391, 68 L. Ed. 748, to the effect that a reviewing court will first determine whether a construction of an act is fairly possible whereby a determination of unconstitutionality can be avoided.

Ergo, aside from his lack of standing, the petitioner has failed to demonstrate that the statutes, in their application by the courts of New York, result in a denial of equal protection.

CONCLUSION

Upon each and every of the foregoing arguments, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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